AT

UNITED
NATIONS

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 700

Case No. 767: BENTHIN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 10 November 1993, Natasha Benthin, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, filed an application requesting the Tribunal:

> "(a) ... to recognize that the decision not to extend my one-year fixed-term appointment with UNEP is made outside the established rules and procedures of the United Nations. ...
>
> (b) To confirm that the decision not to extend my contract was motivated by prejudice.
>
> (c) To establish mala fides on the part of UNEP's management in their non-observance of correct evaluation procedures, and in denying me due and fair process according to the established rules and procedures of the United Nations.
>
> (d) To acknowledge, in accordance with the unanimous judgement of the Joint Appeals Board, that expectations of an extension of my appointment were indeed created by UNEP.
>
> (e) ... to order my re-instatement with UNEP for eight months and twenty days. ...
>
> (f) To recognize the specific responsibility of the four signatories to the 'report on short-term staff' for having evaluated my performance in an arbitrary manner outside the

established norms, rules and procedures of the United Nations, and thus having prejudiced any future career I may have had with the UN.

(g) To order action to be taken by the Secretary-General, in accordance with rules 110.1 'Misconduct' and 110.3 'Disciplinary measures' of the 100 Series Staff Rules (as amended) against the 4 signatories to the report on short-term staff, which led to an unjust and incorrect decision not to extend my appointment. ...

(h) To order UNEP to open my personnel file for clearance of any documentation adverse to me, ... filed without my knowledge, and ensure that my responses to the drafters are attached wherever applicable.

(i) To rescind the decision of the Secretary-General not to compensate me for UNEP's maladministration of my case, and to order the payment of net base salary in General rates from 11 April 1993, when my contract expired, until the date of re-instatement in UNEP. ...

(j) If, ..., UNEP is unable to re-instate me, to compensate me [for the loss of my] net base salary in Nairobi rates for the eight months and twenty days that I would otherwise have worked.

(k) To compensate me for the delay in holding a Joint Appeals Board meeting due to misleading advice by UNEP."

Whereas the Respondent filed his answer on 11 July 1994;

Whereas the Applicant filed written observations on 23 September 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNEP on 11 April 1992, as an Associate Fund Management Officer at the P-2 level, on a one year fixed-term appointment. On 10 April 1993, the Applicant separated from UNEP, upon the expiration of her appointment.

In a letter dated 18 September 1992, the Chief, Fund Programme Management Branch (FPMB), expressed his concern to the Applicant that the Senior Fund Management Officer had requested, in a memorandum of 8 September 1992, to be relieved of responsibility for training the Applicant. He expressed concern that "after nearly

six months in the Fund you have not managed to grasp the basics of the job" and urged her "to concentrate on acquiring the necessary skills required to fulfill your responsibilities as a Fund Management Officer." In a lengthy reply, dated 6 November 1992, the Applicant set forth "the obstacles I have confronted and overcome during my past 6 months."

In a report on short-term staff, signed by the Applicant's supervisor, the Chief, FPMB, on 29 October 1992, and by the Chief of the Division on 30 October 1992, the Applicant was given an overall rating of "fair". No extension of her contract was recommended. The report was neither shown to nor discussed with the Applicant. In a letter dated 13 November 1992, the Chief, Personnel Section, informed the Applicant that UNEP did not intend to extend her fixed-term appointment upon its expiration on 10 April 1993.

In a letter dated 18 November 1992, to the Chief, Personnel Section, the Applicant sought clarification of the basis for the decision regarding her appointment, as no evaluation of her performance had been made. She also asked for information on the recourse procedures available. In a reply dated 20 November 1992, the Chief, Personnel Section, informed the Applicant that "the decision on the non-extension of your fixed-term appointment was taken on the basis of an interim report which rates your performance during the period 11 April 1992 through 31 October as 'Fair', i.e. 'less than good'". With regard to procedure, he noted that expiring contracts were generally extended until 31 December, to accommodate the annual UNEP Management review in May/June of all appointments expiring in the current year. Therefore, he explained, "As your contract is due to expire on 10 April 1992 [sic] it was deemed necessary to recommend an extension beyond this date. But before doing so we had first to request for an interim short-term report on your performance to justify our recommendation." Based on the overall rating of "Fair", he stated "it was not possible for the Management to grant you an interim extension."

In a memorandum dated 4 December 1992, the Applicant informed the Chief of Personnel that she wished to rebut the mid-term

evaluation report. On 6 December 1992, she sent a telefax to the Director of Personnel, questioning the validity of the mid-term evaluation report as a basis for the decision against her. She noted that the report in that form was intended for short-term staff only, that it had not been shown to her as required by staff rule 112.6, and that the rating indicated an arbitrary judgement without explanation. On 11 December 1992, the Applicant requested the Executive Director of UNEP to rescind the decision on her appointment, as "the form, content and the resulting decision is made outside the norms, procedures and rules of the Secretariat, ...".

On 31 December 1992, the UNEP Chief of Personnel advised the Applicant to "urgently inform Personnel in writing of your decision to rebut the short-term report". He wrote to the Applicant on 6 January 1993, that the UNEP Administration "could find no strong justification to change the decision taken earlier". He again advised the Applicant "to exercise your right to rebut the short-term report in accordance with established procedure," so that the investigation could take place prior to the expiration of her fixed-term appointment. On 25 January 1993, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 26 January 1993, a Personnel Officer in the Office of Human Resources Management (OHRM), advised the UNEP Chief of Personnel that "although you have offered staff member the opportunity to rebut the short-term PER, it would perhaps be better to prepare a full report which the staff member can rebut, if she so wishes, in accordance with ST/AI/240/Rev.2." He also suggested, "you may wish to review matter of extension or non-extension" and that such procedure "should be completed and staff member informed prior to expiration of her current appointment on 10 April 1993".

On 29 January 1993, the UNEP Chief of Personnel sent a performance evaluation report (PER) form to the Applicant for completion. In a memorandum dated 2 February 1993, the Applicant informed the UNEP Chief of Personnel that "pending the outcome of

the appeal, it would be inappropriate to proceed with the preparation of another report." In a reply dated 5 February 1993, the Chief of Personnel expressed surprise at the Applicant's refusal to complete the PER. On 8 February 1993, the Applicant clarified that she had not refused to complete the PER but rather had asked whether to do so would be appropriate while her appeal against the evaluation report was pending. On 9 February 1993, the Chief of Personnel noted that it was the Applicant's decision not to complete the PER and not to rebut the report.

On 30 March 1993, the Executive Director advised the Applicant that a completed PER was necessary for JAB consideration of her case. He requested that she complete her section of the PER, in the interest of resolving the matter without further delay. The Applicant completed her section of the PER on 6 April 1993. In a memorandum dated 7 April 1993, she informed the Chief, Personnel Section, that this report "should have been submitted half a year ago, i.e. <u>at the time the decision was made not to extend my contract.</u>" On 7 April 1993, the Applicant's supervisor completed his section of the PER. On 8 April 1993, the second and third reporting officers completed their sections. On 10 April 1993, the Applicant separated from service.

On 15 July 1993, the JAB adopted its report on the Applicant's appeal. It concluded and recommended as follows:

> "25. In conclusion, the Panel finds that the decision not to extend the appellant's contract was faulty on procedural grounds, for two main reasons:
>
> (a) The short-term report is inappropriate for the purpose of recommending against a staff member's extension, as it has no provision for rebuttal;
>
> (b) The UNEP procedures for reviewing fixed-term appointments, in the form and content communicated to the appellant in the letter of 20 November 1992, are irrelevant to the case, and led to a wrong conclusion on the part of the appellant.

26. The Panel specifically recognized the authority of UNEP Management to take decisions on non-extension of contracts for reasons of inadequate performance, provided these decisions are taken fully in accordance with its own procedures, and the provisions of staff rule 104.12(b) regarding fixed-term appointments.

27. Consequently, the Panel recommends that

(a) UNEP make a compensatory payment to the appellant, in the amount equivalent to an extension of her contract through 31 December 1993;

(b) both the short-term report and the PER not acknowledged by the appellant, be withdrawn from her personal status file."

In a letter dated 11 August 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her, inter alia, as follows:

"The Secretary-General has examined your case in the light of the Board's report and has decided to reject the recommendation in paragraph 27 [(a) - see above]

Under staff rule 104.12(b), fixed-term contracts do not carry any expectancy of renewal, whether or not the performance of the staff member is satisfactory. In this particular case you also were given notice of non-renewal of your contract well in advance of its expiration.

The Secretary-General has approved the part of the recommendation in the paragraph 27 [(b) - see above]

Because there were procedural shortcomings in the process of evaluating your performance, he has decided to accept the recommendation of the Board."

On 10 November 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision not to extend the Applicant's appointment was made on the basis of a performance report intended for short-

term staff only, which was not shown to her before the decision was made. This constituted a violation of ST/AI/240 Rev.2, UNEP/EDB/90/11/Rev.1, and staff rule 112.6.

2. The failure to comply with procedural requirements concerning the evaluation of the Applicant's performance and the decision not to renew her appointment constitutes maladministration, which should be subject to disciplinary action.

3. The Applicant was a victim of prejudice and mala fides.

Whereas the Respondent's principal contentions are:

1. Outstanding performance does not create a legal expectancy to further employment with the Organization. A fortiori, a staff member involved in ceaseless disputes with her colleagues during her first year fixed-term appointment cannot have a legal expectancy to further employment.

2. The Applicant's performance was later properly appraised and, given the results of that appraisal, no compensation should be payable in respect of the procedural irregularities that occurred in connection with the first PER.

3. The Applicant's terms and conditions of employment do not give her any right to require that disciplinary action be taken against other staff members.

The Tribunal, having deliberated from 28 June to 27 July 1995, now pronounces the following judgement:

I. This is an appeal from a decision by the Secretary-General, dated 11 August 1993, rejecting the JAB's recommendation that the Applicant be compensated "in the amount equivalent to an extension of her contract through 31 December 1993". The Respondent did, however, approve the JAB's recommendation that "both the short-term report and the PER not acknowledged by the Applicant be withdrawn from her personnel status file".

II. The Applicant's principal contention before the Tribunal is that the non-renewal of her appointment was based solely on the initial performance evaluation report (PER), which was defective both in form and in substance. In addition, the Applicant alleges that she had an expectation of renewal. The Applicant seeks reinstatement in her post, as well as the compensation recommended by the JAB.

III. Regarding the Applicant's expectation of renewal, the Tribunal agrees with the Respondent's legal argument; there was no right to or legal basis for the Applicant's expectation. The Applicant was serving on a one year fixed-term appointment, which was subject to the conditions specified therein, and in the Staff Regulations and Rules. Staff rule 104.12(b) provides that:

> "The fixed-term appointment does not carry any expectancy of renewal or conversion to any other type of appointment."

A statement on non-expectancy of renewal was also expressly included in the Applicant's Letter of Appointment.

In addition, the Tribunal has consistently held that employment with the United Nations ceases on the expiration date of a fixed-term appointment and that a legal expectancy of renewal would not be created by efficient or even outstanding performance (Cf. Judgements No. 173, Papaleontiou (1973); No. 205, El-Naggar (1975); No. 368, Roy (1986); No. 427, Raj (1988); No. 440, Shankar (1989).

IV. As part of her claim, the Applicant asserts that the non-renewal of her appointment was motivated by prejudice and mala fides on the part of UNEP's management. In this respect, the Tribunal has held:

> "... The Tribunal's jurisprudence has consistently maintained that while, under the Regulations and Rules governing fixed-term contracts, the Respondent has the unquestioned right to terminate such contracts, it must nevertheless be ensured

> that the decision to terminate must not be tainted by caprice, prejudice, falsehood or any serious lack of due process." (Cf. Judgement No. 345, Najjar (1985)).

The burden of showing that prejudice or other improper motivation was the basis for decisions taken by the Respondent lies with the Applicant. It has been determined that:

> "Under the Tribunal's consistent jurisprudence, the burden of proving prejudice or other improper motivation rests with the Applicant". (Cf. Judgement No. 465, Safavi (1989).

Upon reviewing the file in this case, the Tribunal finds that the Applicant has failed to meet the required burden of proof; the evidence does not establish that the non-renewal of her appointment was motivated by prejudice or any other improper motivation on the part of the Respondent. On the contrary, the record shows a continuing series of problems created by the Applicant's difficulties in maintaining harmonious relations with her colleagues. It also shows that this unsatisfactory aspect of her performance had been called to her attention by her supervisors. The Applicant did not have responsibilities of a supervisory nature with respect to her colleagues, but seems to have offended them frequently by acting as if she did.

This case is therefore distinguishable from cases such as that of Beg rendered today (Judgement No. 702), where the Applicant did have such responsibilities.

V. The Tribunal believes and the Respondent does not deny that procedural errors occurred in the preparation of the Applicant's initial PER. However, the Tribunal considers that whatever the faults in the procedure in preparing the initial PER, the fact remains that the Applicant's performance was considered deficient. This conclusion is not without support in the record.

VI. However, the Tribunal notes that the procedural errors admitted by the Respondent in connection with the Applicant's

initial PER injured the Applicant in that she was deprived of the opportunity to submit a rebuttal. The subsequent PER, having been prepared only following her appeal to the JAB, was, as a practical matter, not subject to effective rebuttal. Accordingly, the Tribunal orders the Respondent to pay to the Applicant, as compensation, the equivalent of three months of her net base salary at the rate in effect on the date of her separation from service.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Francis SPAIN
Member

Mayer GABAY
Member

Geneva, 27 July 1995

B. Maria VICIEN-MILBURN
Executive Secretary